Supreme Court, U.S.
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No. 89-1682

In The

Supreme Court of the United States

October Term, 1990

ALAN J. STALHEIM, M.D.,

Petitioner,

vs.

ALBERT LEA MEDICAL SURGICAL CENTER, LTD., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Federal District Court exceeded its legal authority in dismissing petitioner's cause of action with prejudice after counsel, acting with full authority of their respective clients, made a full, complete and final settlement of the cause of action.

LIST OF PARTIES

PETITIONER:

ALAN J. STALHEIM, M.D.

RESPONDENTS:

ALBERT LEA MEDICAL SURGICAL CENTER, LTD.; ALBERT LEA REGIONAL MEDICAL GROUP, P.A.; LOWELL WHERRY BARR, M.D.; ARLO ROSLYN BLUMER, M.D.; JAMES FOY BURNS, M.D.; DENNIS A. COLBY, D.O.; TERRY LEE MARTINSON, M.D.; RICHARD SHEPARD, M.D.; THOMAS ANDREW TREANOR, M.D.; C.C. LOWERY; DAVID L. VAN FOSSEN; NAEVE HOSPITAL; LARRY W. PFAFF; L.E. SHELHAMER, M.D.; DANIEL J. McCORMICK; NAEVE HEALTH CARE ASSOCIATION; JOHN DOE, MARY ROE; and XYZ CORPORATION.

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STATEMENT OF THE CASE

Respondents Naeve Health Care Association, Naeve Hospital, Larry W. Pfaff and Daniel J. McCormick (hereinafter referred to collectively as the Naeve Respondents) concur in the factual matters contained in petitioner's statement of the case. The Naeve Respondents add the following additional statements of fact:

The October 3, 1988, proceeding before Magistrate Janice M. Symchych took place on the record. That proceeding was not a formal evidentiary hearing in that witnesses were not called, the Rules of Evidence did not strictly apply, and there was no sworn testimony. However, Magistrate Symchych gave petitioner an opportunity at that hearing to say whatever he wanted to say. Petitioner's attorney was also present at that hearing. Based upon the October 3, 1988, hearing, Magistrate Symchych found that the parties had reached a settlement. Judge Donald Alsop later heard Dr. Stalheim's arguments to reopen the case, but denied the request. Petitioner did not request a full evidentiary hearing before Judge Alsop. Petitioner did not request a formal evidentiary hearing until he appealed the decision of the District Court to the United States Court of Appeals for the Eighth Circuit.

At the October 3, 1988, hearing, petitioner clearly stated that shortly after the August 22, 1988 settlement conference, he agreed to the settlement to counsel for respondents but that he later changed his mind concerning the wisdom of the settlement. It was based on his subsequent reconsideration of the settlement terms that Dr. Stalheim hired new attorneys and argued that he had not given his former attorneys authority to settle.

The District Court dismissed petitioner's action with prejudice by order dated October 7, 1988. Petitioner moved to reopen which the District Court denied on February 17, 1989. On March 1, 1989, the District Court denied petitioner's motion for reconsideration of the February 17 order. Petitioner appealed to the Eighth Circuit Court of Appeals. The opinion affirming the judgment of the District Court appears in the appendix of petitioner at 36a-39a.

SUMMARY OF ARGUMENT

This Court should deny petitioner's request for a writ of certiorari. Petitioner has advanced no compelling reason to grant the writ pursuant to Supreme Court Rule 17.1. The District Court and the Court of Appeals for the Eighth Circuit have not rendered decisions in conflict with the decisions of other Federal Courts of Appeals on the same question; the District Court and the Court of Appeals for the Eighth Circuit have not decided an important question of Federal law which justice requires this Court to resolve; nor have the courts below so far departed from the accepted and usual course of judicial proceedings as to warrant exercise of this Court's supervisory powers. The District Court merely exercised a power which all District Courts incontrovertibly possess: the power to dismiss a cause of action with prejudice after it had been settled by attorneys acting with authority of their respective clients.

Additionally, this Court should deny petitioner's request for a writ of certiorari on the grounds that

petitioner has waived his right to seek the writ. Petitioner asserts that the courts below departed from the usual and accepted course of judicial practice by failing to grant him an evidentiary hearing to resolve the question of whether he had given his attorney authority to settle. However, petitioner did not request an evidentiary hearing before Magistrate Symchych or Judge Alsop of the District Court. The request for an evidentiary hearing first appears in petitioner's brief to the Court of Appeals for the Eighth Circuit. The Court of Appeals may not consider an argument which was not raised in the District Court. By failing to demand an evidentiary hearing, Plaintiff has waived any right to rely upon this asserted ground before this Court.

Petitioner also alleges that the courts below departed from the usual and accepted course of justice in failing to require strict compliance with the provisions of Rule 41 FRCP. Petitioner's reliance upon the provisions of Rule 41 FRCP appears for the first time in the instant petition to this Court. Petitioner did not assert the alleged violation of Rule 41 before the Magistrate, before the District Court, or before the Eighth Circuit. He has therefore waived any reliance on Rule 41.

Finally, this Court should deny the petition for a writ of certiorari on the grounds that, even if petitioner has not waived his demand for an evidentiary hearing or reliance upon Rule 41 FRCP, he has entirely failed to show that the courts below committed any error. He is not entitled to any greater hearing than the proceeding which took place before Magistrate Symchych. The Magistrate and the District Court properly found that he gave his former attorneys authority to settle the case and the

Eighth Circuit applied the proper legal standard in affirming the District Court decision. There has been no violation of Rule 41. Courts possess inherent power to dismiss settled cases with prejudice and remove such cases from the docket.

Petitioner cannot have suffered any prejudice from the lack of a formal evidentiary hearing at which he would have been permitted to call witnesses and elicit their sworn testimony. The Magistrate specifically asked petitioner at that hearing whether he had given his then attorneys authority to settle. Petitioner himself was the person with the most knowledge concerning that question. He admitted at the hearing before the Magistrate that he previously agreed to the terms of the settlement and gave his attorneys authority to settle the lawsuit. Although his testimony was not sworn, petitioner cannot complain that his own testimony was unsworn or that he had no opportunity to cross-examine himself.

REASONS FOR DENYING THE WRIT

I.

The District Court properly exercised its inherent power to dismiss a cause of action with prejudice following settlement thereof by attorneys acting with authority of the clients; in the present case, petitioner did not voluntarily dismiss his lawsuit by stipulation or otherwise; therefore, Rule 41(a) FRCP does not apply; in any event, petitioner has waived any right to rely upon an asserted violation of Rule 41 of failing to raise the issue below.

The Court should deny the petition for a writ of certiorari because petitioner has failed to show that the

courts below have departed from the usual and accepted course of justice or that they have ruled on a significant Federal question in a manner which conflicts with rulings of other Federal District Courts or Courts of Appeals. There is no occasion for this Court to develop, clarify or harmonize conflicting rulings of existing law. The District Court was well within its authority in dismissing petitioner's cause of action with prejudice following settlement thereof; the Eighth Circuit Court of Appeals applied the proper standard of review in affirming the District Court's judgment of dismissal.

Petitioner endeavors to make a showing of some sort of violation of Rule 41(a) FRCP. However, petitioner makes his Rule 41 argument for the first time in the instant petition. He did not bring the alleged violation of Rule 41 to the attention of the Magistrate, the District Court, or the Court of Appeals. Therefore, petitioner has waived the Rule 41 argument. This Court does not entertain arguments not considered by the lower courts. *Becker Steel Company v. Cummings*, 296 U.S. 74, 56 S.Ct. 15 (1935); *Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719 (1941); *Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399 (1976).

Even if petitioner has not waived his Rule 41 argument, it is clear that the Rule does not apply to the facts of this case. Rule 41(a), by its terms, applies only to voluntary dismissal of a cause of action by the plaintiff. Plaintiff may voluntarily dismiss an action by filing a notice of dismissal before an adverse party answers or files a motion for summary judgment, Rule 41(a)(1)(i) FRCP; by filling a stipulation of dismissal signed by all parties, Rule 41(a)(1)(ii) FRCP; or the court may order dismissal of an action at the plaintiff's instance "upon

such terms and conditions as the court deems proper". Rule 41(a)(2) FRCP.

All of the above are methods by which plaintiff may voluntarily dismiss an action. In the present case, plaintiff did not voluntarily dismiss his lawsuit. Instead, the court dismissed the action following settlement thereof on its own initiative, not at petitioner's instance. The court's action was either an exercise of an inherent power, *Bergstrom v. Sears Roebuck & Company*, 532 F.Supp. 923, 934 (D. Minn. 1982), or a dismissal under Rule 41(b) FRCP, the last sentence of which provides:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and *any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." (Emphasis added).

Rule 41 does not specifically provide for a dismissal following settlement; therefore, pursuant to the terms of the Rule, the dismissal operates as an adjudication on the merits. Regardless of the source of the court's power to dismiss a matter following settlement, it is apparent that Rule 41(a) has no application to facts of this case whatsoever.

The District Court "possesses inherent power to enforce settlement agreements in cases pending before it." *Bergstrom v. Sears Roebuck & Company*, 532 F.Supp. 923, 934 (D. Minn. 1982), citing *Aro Corporation v. Allied Witan Company*, 531 F.2d 1368 (6th Cir. 1976), cert. denied, 429 U.S. 862 (1976). "It is well settled that courts retain inherent power to enforce settlement agreements reached in

litigation pending before them." *Debose v. Mueller,* 552 F.Supp. 307, 308 (N.D. Ill. 1982). District courts also possess inherent power to find that a settlement has occurred. Courts may make such a finding in summary proceedings, such as occurred in the present case, where the assertion that a settlement has not occurred is "insubstantial". *Autera v. Robinson,* 419 F.2d 1197, 1200 (D.C. Cir. 1969).

It is an elementary principle of law that a settlement is binding upon the parties and may not be set aside merely because one of the parties has become dissatisfied or has changed his mind. "Once a settlement is reached, it cannot be repudiated by the parties." *Debose v. Mueller,* 552 F.Supp. at 307, n. 1. The Federal District Court in Louisiana has held that:

> "A settlement agreement will not be opened merely to inquire into the equities between the parties or because one of the parties has become dissatisfied with the agreement." *Thibaut v. Ourso,* 605 F.Supp. 1, 3 (M.D. La. 1981) app. dism. 705 F.2d 118 (5th Cir. 1983).

Under Minnesota law, an attorney has the authority to settle a case on behalf of a client. The statute provides:

> "An attorney may bind a client, at any stage of an action or proceeding, by agreement make in open court or in the presence of the court administrator and entered in the minutes by such administrator or made in writing and signed by such attorney." Minn. Stat. §481.08.

A settlement agreement is essentially a contract requiring an offer and acceptance on the essential terms of the agreement. *Ryan v. Ryan,* 292 Minn. 52, 193 N.W.2d 295 (1971). The settlement of a lawsuit is greatly favored

by the courts; a settlement will not lightly be set aside. *Beech v. Anderson*, 417 N.W.2d 709 (Minn. App. 1988). An attorney with the express or implicit authority of his client may settle a cause of action and bind the client to the settlement. *Skalbeck v. Agristor Leasing*, 384 N.W.2d 209 (Minn. App. 1986). The party seeking to set aside a settlement on the grounds that the party's attorney had no authority to settle has the burden of showing absence of authority. *Greater Kansas City Laborers Pension Fund v. Paramount Industries, Inc.*, 829 F.2d 644, 646 (8th Cir. 1987). The Eighth Circuit characterized this as "a heavy burden". *Greater Kansas City Laborers*, 829 F.2d at 646. Judge Dumbauld, concurring in the majority opinion, cautioned the District Court against wasting time in threshing "old straw", 829 F.2d at 647, in cases where a settling party seeks to avoid the settlement, although the judge noted that this would produce "ennui" rather than "unspeakable pain." 829 F.2d at 647, n. 3.

Petitioner appears to argue that the District Court improperly interfered in the parties' settlement and interjected an unwarranted condition upon that settlement by dismissing the matter with prejudice following the settlement. Although petitioner does not state what the court should have done, apparently he feels that the court should have allowed the parties to settle the matter and stipulate to dismiss it without prejudice. This scenario is nonsensical. A settlement is a full and final resolution of a lawsuit. There is no such thing as a dismissal without prejudice following settlement. In the first place, no defendant would pay money in settlement if plaintiff is free to sue him again. Secondly, compromise and settlement acts as a merger of, and precludes all right to recover on

an antecedent claim. 15 Am.Jur.2d, Compromise and Settlement, §24. In other words, a party cannot bring a second lawsuit on the same cause of action following settlement. The settlement is a full satisfaction of the claim and is a defense to any second lawsuit. *Dieudonne v. Arco Co.*, 139 Minn. 441, 166 N.W. 1067 (1918).

The claim that the court improperly interfered in the parties' settlement by dismissing the matter with prejudice is completely spurious. The settlement by operation of law fully and finally terminates the matter. Upon settlement, the court has the inherent power to dismiss the matter with prejudice, if for no other reason, to remove the case from its docket in the exercise of the court's power to maintain control over its calender and docket.

Petitioner's reliance upon *Gardiner v. A. H. Robins Co., Inc.*, 747 F.2d 1180 (8th Cir. 1984) is totally misplaced. *Gardiner* does not "stand for the proposition that the District Court [in the present case] acted in excess of its jurisdictional authority." (Petitioner at 11-12). In *Gardiner*, the parties entered into settlement agreements and stipulations of dismissal with prejudice. The court sua sponte entered a "So Ordered" notation on the settlement agreement, thereby transforming it from a private contract into a decree of the court. A violation of a court decree would be punishable with contempt proceedings, whereas the only remedy for a private contract is another lawsuit. Defendants objected to the District Court's notation on the settlement agreement. The Eighth Circuit agreed and reversed. *Gardiner*, 747 F.2d at 1183. The District Court improperly interfered in the parties' settlement by transforming it into a court decree. However, no one disputed

the propriety of entering a judgment of dismissal with prejudice following the settlement.

In the present case, the District Court did not interfere with the parties' settlement at all. The court simply found that a settlement had occurred and dismissed the matter with prejudice pursuant to the settlement. Unlike the District Court in *Gardiner*, the District Court here did not transform the parties' settlement agreement into a decree of court, punishable by contempt. The District Court merely removed a settled case from its docket.

Similarly, petitioner's reliance upon *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985) is misplaced. In *McCall-Bey*, the parties agreed to a settlement and stipulated to dismiss the matter with prejudice. Pursuant to the settlement, the District Court dismissed the action. One party failed to comply with the terms of the settlement agreement. The issue was whether the Federal District Court retained power under Rule 41 to enforce the settlement or whether the party seeking enforcement must proceed in a separate lawsuit in State Court. *McCall-Bey*, 777 F.2d at 1185.

McCall-Bey is completely irrelevant to the facts of the present case. In the present case, enforcement of the settlement is not an issue. The dispute is whether a settlement occurred. The District Court, properly exercising a valid power of the court, found that there was a settlement and dismissed the case.

II.

The District Court did no err in failing to give petitioner a full evidentiary hearing where petitioner made no request for such a hearing from the District Court; the Magistrate conducted a hearing at which petitioner had an opportunity to be heard; petitioner acknowledged at that hearing that he agreed to the terms of the settlement and gave his attorney full authority to settle, but that he later changed his mind.

Contrary to petitioner's assertion, he is not entitled to a full evidentiary hearing on the issue of whether he gave his former attorneys authority to settle the case. First, the request for an evidentiary hearing is not properly before this Court for the simple reason that petitioner never asked for such a hearing in the District Court. The request for an evidentiary hearing first appears in petitioner's brief to the Eight Circuit. An Appellate Court, whether the Eighth Circuit Court of Appeals or this Court, will not consider an issue not raised at the trial court level. Therefore, petitioner has waived any right he may have had to demand an evidentiary hearing.

Even if petitioner had not waived an evidentiary hearing, it is clear that he is not entitled to one. The Magistrate gave petitioner a hearing, although not a full evidentiary hearing. The Magistrate had the power to find summarily that there was a settlement agreement without a full evidentiary hearing based on the unequivocal facts of the case. Similarly, the District Court correctly found that the parties had entered into a settlement.

The courts have the inherent power to summarily enforce settlement agreements without an evidentiary hearing. *Aro Corporation v. Allied Witan Company*, 531 F.2d

1368 (6th Cir. 1976). Where there is a genuine dispute concerning the issue of whether an attorney had authority of a client to enter into a settlement, then an evidentiary hearing may be proper. *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 622 (6th Cir. 1973). In *Kukla*, the Sixth Circuit held that the District Court could not determine the issue of an attorney's authority based upon affidavits and unsworn statements of the attorney. *Kukla*, 483 F.2d at 622. However, in the present case, the Magistrate did not simply consider affidavits and unsworn statements of the attorneys. The Magistrate gave petitioner an opportunity to personally say whatever he wanted to say on the question. Although petitioner was not sworn at that time, he can scarcely complaint that his own testimony was unsworn or that he had no opportunity to cross-examine himself.

Petitioner represented to the court on October 3, 1988, that he once had agreed to the terms of the settlement as outlined by his former attorney. Further, the Magistrate found that the terms of the settlement were consistent with the discussions at the settlement conference on August 22, 1988, at which petitioner was present. Petitioner acknowledged that he agreed with the terms of the settlement shortly after the August 22 settlement conference, but that he changed his mind following that conference. The Magistrate and the District Court correctly found that there was a settlement and that petitioner gave his attorneys full authority to settle on the basis of the terms as outlined. There is no need for a full evidentiary hearing where petitioner has already been given a hearing to confirm the terms of the previous settlement conference and where he personally confirmed

that he agreed to the terms of the settlement. Additionally, the present request for an evidentiary hearing is improper where petitioner did not request such a hearing from the District Court.

The proper standard for an Appellate Court to apply to the District Court's judgment of dismissal is whether the findings are clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-574 (1985). If the findings are not clearly erroneous, then the Appellate Court should affirm the District Court's entry of judgment of dismissal. The Eighth Circuit Court of Appeals properly applied this standard of review and affirmed the District court.

CONCLUSION

In his petition for writ of certiorari, petitioner relies upon Rule 41 and his demand for an evidentiary hearing. However, he raised neither of these arguments before the District Court. Therefore, he will not be heard before this Court to raise such issues.

The sole issue before the District Court was whether petitioner agreed to the settlement and gave his attorneys authority to settle on the terms as outlined. The Magistrate found that he had in fact agreed and given authority. The District Court confirmed the Magistrate's finding and the Eighth Circuit Court of Appeals properly applied the not clearly erroneous standard of review and affirmed.

This Court does not sit as a fact finding body. The finding that petitioner agreed to the settlement and gave his attorneys authority is not clearly erroneous.

Petitioner has failed to raise an important question of Federal law, nor has he shown that the Eighth Circuit has issued a ruling in conflict with rulings of other courts of appeal. There simply is no basis for granting the writ.

For all the above reasons, this Court should deny the petition for a writ of certiorari.

DATED: May 30, 1990.

Respectfully submitted,

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